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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMES YSIDRO RUHMAN, Defendant and Appellant.	G035373 (Super. Ct. No. 04HF2025) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Susanne S. Shaw, Judge. Reversed.

Cynthia M. Sorman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Robert M. Foster and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

James Ysidro Ruhman pleaded guilty to various criminal offenses following the denial of his motion to suppress evidence. He complains the investigating officer lacked reasonable suspicion to detain him and therefore the trial court should have

suppressed the evidence seized during a subsequent search of his person. We agree defendant was illegally detained and the evidence should have been suppressed as a direct product of the detention. Accordingly, we reverse.

I

FACTS AND PROCEDURAL HISTORY

Shortly after 9:00 p.m., on an intermittently rainy December 28, 2004, Officer Wessel approached a residential area near the intersection of West Wilson and Federal Avenue in response to a radio dispatch that a "citizen" had reported "someone loitering . . . in the shadows near a utility box . . . ." As Wessel proceeded southbound on Federal towards his destination, he saw a patrol car driven by Officer Leffingwell proceeding eastbound along Wilson. Three to five seconds later, defendant, who fit the description of the person reported to be near the utility box, crossed Federal in front of Wessel's patrol car walking eastbound on Wilson away from the box.

Wessel stopped his car at the curb, stepped out of the vehicle, and asked defendant if "I could talk to him for a minute." Defendant "stopped . . . , turned and faced [Wessel,] and took a few steps towards [the] police car." Wessel asked defendant "where he was going," and defendant replied "he was waiting for a ride, he was going to be picked up by his girlfriend." Wessel asked defendant "where he was coming from, and [defendant] pointed west down Wilson Avenue and said he had come from back there." Defendant acknowledged he had been standing by a utility box. According to Wessel, the utility box was "on the north curb of Wilson Avenue." The street lamp did not illuminate that particular area, which was 30 to 40 yards from the officer when he first contacted defendant. Wessel informed defendant that he was "respond[ing] to a call of a subject standing near a utility box." Defendant "nodded his head and . . . turned to . . . continue walking eastbound on Wilson . . . ."

At this point, Wessel told defendant, "Wait. I need to talk to you," directed defendant "not to walk away," and asked to see his identification. Defendant turned around and faced Wessel. Wessel saw Leffingwell's patrol car approach their location. Just before Leffingwell arrived, defendant "motioned towards his pockets as if he was searching for a wallet, . . . turned . . . facing east on Wilson," and ran from the scene.

The officers apprehended defendant after a short chase. Defendant was placed under arrest, and officers discovered contraband after searching defendant and the route he took when he attempted to flee.

The prosecution charged defendant with possession for sale of methamphetamine (Health & Saf. Code, § 11378), transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)), and various misdemeanor offenses, including resisting arrest. Defendant pleaded guilty after the trial court denied his suppression motion and received a two-year prison sentence. Defendant now appeals.

II

DISCUSSION

A. *Standard of Review*

As with all warrantless searches and seizures, the prosecution has the burden of proving by a preponderance of the evidence the legality of a temporary detention. (*People v. Torres* (1992) 6 Cal.App.4th 1324, 1334.) "In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. [Citation.] We review the court's resolution of the factual inquiry under the deferential substantial evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review." (*People v. Ramos* (2004) 34 Cal.4th 494, 505.)

B. *A Detention Occurred When the Investigating Officer Directed Defendant to Remain on the Scene for Further Questioning*

We must first determine whether Wessel's initial interaction with defendant constituted a detention. Not all police contacts are detentions. The Fourth Amendment is not implicated when an officer approaches an individual in a public setting and merely asks if he or she would answer some questions, provided the officer does not induce cooperation by coercive means. (*United States v. Drayton* (2002) 536 U.S. 194, 200-201; *Florida v. Royer* (1983) 460 U.S. 491, 497 (plur. opn.).) No objective justification is required for these police initiated contacts, but the individual "need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. [Citations.] He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." (*Royer*, at p. 498.)

An individual is detained for Fourth Amendment purposes when the suspect either submits to a show of authority or is physically restrained by a peace officer. (*California v. Hodari D.* (1991) 499 U.S. 621, 626 (*Hodari D.*); *People v. Johnson* (1991) 231 Cal.App.3d 1, 10-11.) The requisite show of authority exists when a reasonable person would believe he or she was not free to leave. (*Michigan v. Chesternut* (1988) 486 U.S. 567, 573.) Thus, a detention occurs when a suspect obeys a command to stop for questioning. (*People v. Roth* (1990) 219 Cal.App.3d 211, 213-215 ["'Come over here. I want to talk to you'"]; *Johnson*, at p. 10 [""Come down towards me. Step down off that landing""]; *People v. Verin* (1990) 220 Cal.App.3d 551, 555 ["'Hold it. Police'"].)

Here, Wessel's initial interaction with defendant constituted a consensual encounter requiring no justification because defendant agreed to answer the officer's questions. But when defendant decided to end the discussion and started to walk away, Wessel directed him to stop and display his identification. The Attorney General

concedes Wessel's directive constituted a show of authority and resulted in a detention when defendant initially complied with the officer's order.[1]

C. *The Prosecution Failed to Demonstrate an Objective Basis, Supported by Specific Articulable Facts, to Support the Detention*

We next consider whether the prosecution met its burden to establish the legality of the detention. Police investigators may stop and briefly detain a person "if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause. [¶] The officer, of course, must be able to articulate something more than an 'inchoate and unparticularized suspicion or "hunch."' [Citation.] The Fourth Amendment requires 'some minimum level of objective justification' for making the stop." (*United States v. Sokolow* (1989) 490 U.S. 1, 7.) We must examine the "totality of the circumstances" in each case to determine whether a "particularized and objective basis" supports the detention. (*United States v. Cortez* (1981) 449 U.S. 411, 417.) "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' [Citations.] Although an officer's reliance on a mere '"hunch"' is insufficient to justify a stop [citation], the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard [citation]." (*United States v. Arvizu* (2002) 534 U.S. 266, 273-274.) Thus, "[a] detention is reasonable under the Fourth Amendment when the detaining

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[1] A defendant who flees the scene in response to an assertion of authority has not been seized and therefore his Fourth Amendment rights are not implicated. (*Hodari D., supra,* 499 U.S., at pp. 626, 629.) Because the People did not raise the issue below, we need not consider whether defendant yielded to the officer's assertion of authority when he briefly complied with the order to stop before altering his course and fleeing the area. (See *United States v. Brown* (4th Cir. 2005) 401 F.3d 588, 594-595 [suspect seized when he "initially submitted" to officer's order to place his hands on parked car].)

officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231 (*Souza*).)

Here, Wessel responded to a report of a man standing or loitering near a utility box in a residential area around 9:30 p.m. Other than a description of the individual, no further information was provided. Although warranting an investigation, this information alone fails to provide an objective basis for concluding criminal activity "may be afoot." (See *Alabama v. White* (1990) 496 U.S. 325, 329 [an anonymous tip, conveying only general information, seldom provides basis for detention]; *People v. Jordan* (2004) 121 Cal.App.4th 544, 554.) If this information were deemed sufficient to support defendant's detention, then police could detain virtually anyone lingering on a residential sidewalk at the conventional hour of 9:30 p.m. Of course, further investigation may provide the basis for a detention. For example, Wessel could have validly detained defendant had he learned that defendant had been peering into residences in front of and adjacent to the utility box because the officer could have surmised defendant contemplated a burglary. But the only additional facts the prosecution offered to support the detention concerned the location where Wessel first contacted defendant and the information he received in their brief conversation.

Wessel first encountered defendant walking away from the utility box, located 30 to 40 yards behind him. Answering Wessel's questions, defendant explained he was waiting for his girlfriend to pick him up and acknowledged he had been standing by the utility box. After providing an innocent explanation for his presence in the area, defendant decided to end the consensual encounter and started to walk away when Wessel detained him. Thus, the issue is whether the additional information Wessel obtained from locating and talking to defendant justifies the ensuing detention. We conclude this additional information, considered in conjunction with all the

circumstances, does not furnish an objective basis to conclude defendant may have been involved in criminal activity.

In examining what level of suspicion the officer could attach to defendant's conduct, we are handicapped by the prosecution's failure to ask Wessel to identify the specific facts causing him to suspect defendant of criminal conduct. Nor did the prosecution rely on Wessel's experience as a nine-year veteran of the police force or any specialized training he may have received. True, as the Attorney General points out, uncertainty as to the precise nature of the suspect's criminal endeavors is not necessary to support a detention. But here, there is no evidence the officer suspected defendant of *any* criminal conduct. Ostensibly innocent conduct is often placed in a more sinister light when the investigating officer, based on training and experience, explains why certain facts aroused suspicion, but the prosecution failed to present this evidence. Indeed, in the absence of this evidence, the trial court concluded the officer did not suspect "anything."[2]

The prosecution also failed to offer evidence that the detention occurred in a high crime area, or that certain types of crime are prevalent in that locale. These are highly relevant considerations when evaluating whether defendant's innocent actions may otherwise suggest criminal activity. (See *Souza, supra*, 9 Cal.4th at p. 240 [area's reputation for criminal activity an appropriate consideration in assessing reasonableness of detention]; *People v. Pitts* (2004) 117 Cal.App.4th 881, 887 [character of area a factor that provides meaning to the suspect's behavior].) Consequently, no evidence exists to cast a sinister light on defendant's actions based on the character of the area.

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[2] Although the trial court commented that the officer did not suspect defendant of criminal activity ("I don't think the officer suspected anything"), the court found the initial consensual encounter continued when defendant complied with Wessel's directive not to walk away and to produce identification. In other words, the trial court found these statements did not amount to a show of authority creating a detention. As noted above, the Attorney General does not make this argument on appeal.

Thus, it appears defendant was detained for standing on a residential sidewalk at a conventional hour, walking approximately 30 to 40 yards away from where he had been standing, and explaining that he had been waiting for his girlfriend. Assuming the officer based his decision on these facts, the ensuing detention falls short of the minimum level of objective justification necessary to support a detention.

III

DISPOSITION

The judgment is reversed.

ARONSON, J.

I CONCUR:

FYBEL, J.

RYLAARSDAM, ACTING P. J.,

I respectfully dissent because I conclude the facts known to Officer Wessel when he ordered defendant to wait and asked to see his identification were sufficient to support a temporary detention.

"A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231; see also *People v. Wells* (2006) 38 Cal.4th 1078, 1083.) When he attempted to detain defendant, Wessel had corroborated the citizen's report of someone standing in the shadows near a utility box on a residential street at night. Defendant's explanation for his presence at this location, waiting for a ride, was an innocent one. But "The possibility of an innocent explanation . . . does not preclude an officer from effecting a stop to investigate the ambiguity. [Citations.]" (*People v. Saunders* (2006) 38 Cal.4th 1129, 1136-1137; see also *Terry v. Ohio* (1968) 392 U.S. 1, 22 [88 S.Ct. 1868, 20 L.Ed.2d 889].) Wessel testified it was a rainy evening and described the utility box's location as "basically in the front yard of a home" in an area not illuminated by nearby street lights. Furthermore, Wessel encountered defendant as he was walking away from the utility box, a movement both inconsistent with the explanation given for his presence at the location and which coincided with the approach of Officer Leffingwell's patrol car. Finally, the incident occurred during the year-end holiday period when many people are away from home.

Contrary to the majority's conclusion, Wessel did testify to the specific facts that led him to try and detain defendant. While the majority note the prosecutor never asked Wessel to identify the specific nature of the criminal

conduct he suspected defendant might be engaged, they concede a temporary detention is not rendered unreasonable simply because the investigating police officer "expresse[s] some uncertainty as to the nature of the criminal activity he suspect[s] . . . ." (*People v. Leyba* (1981) 29 Cal.3d 591, 599.) The United States Supreme Court has also recognized that, in determining whether the totality of the circumstances establishes reasonable cause to detain a person, a police officer can rely on common sense conclusions about the behavior patterns of criminals. (*United States v. Sokolow* (1989) 490 U.S. 1, 7-8 [109 S.Ct. 1581, 104 L.Ed.2d 1]; *United States v. Cortez* (1981) 449 U.S. 411, 418 [101 S.Ct. 690, 66 L.Ed.2d 621] It is well known that burglars prefer to strike residences when the occupants are away and the year-end holiday season usually presents an abundance of such opportunities. Given the residential nature of the area, time of day, and the time of year, it is likely Wessel suspected defendant was either about to commit a burglary or casing the area for that purpose.

The presence of a person standing in the shadows near a utility box in front of a residence on a rainy, weekday night during the year-end holiday season who, although claiming to be waiting for a ride, immediately begins to leave the area upon the approach of a police car, presents sufficiently suspicious activity for a police officer to temporarily detain the individual. Thus, I believe Wessel had reasonable cause to stop defendant in this case. Once defendant ran, Wessel had cause to arrest him for delaying or obstructing the investigation.

I conclude the trial court properly denied defendant's motion to suppress evidence and would affirm the judgment.

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RYLAARSDAM, ACTING P. J.